Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES H. BEHLEN *et al.*,

Petitioner,

v.

MERRILL LYNCH & CO., INC., and
PHOENIX INVESTMENT PARTNERS, LTD. *et al.*,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal securities laws contain no general bar against various private suits based on state common law in state court. Furthermore, 15 U.S.C. § 77v provides for concurrent jurisdiction and a bar to removal from state court to federal court of federal securities-law claims arising under the Securities Act of 1933, except as provided in the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA declares that "class actions" asserting state-law claims based on untrue statements in connection with the purchase of securities may not "be maintained." In this case, the Eleventh Circuit found that a district court possessed removal jurisdiction over a state-law action filed originally in state court, though there had been no determination that the action was due to be maintained as a class action. The Eleventh Circuit also found that the district court properly dismissed, with prejudice, claims of class-wide wrongdoing, even after deletion of fraud claims and any references to untrue statements in the complaint.

1. Does the requirement of SLUSA, codified in 15 U.S.C. § 77p(b), that "no covered class action . . . may be maintained" authorize dismissal, with prejudice, of an entire complaint, including not only state-law claims of class-wide untrue statements in connection with the purchase of securities, but also state-law claims of class-wide misconduct for breach of contract or negligence for service charges imposed during the period of ownership?

2. Does the portion of SLUSA, codified in 15 U.S.C. § 77p(b), which provides that "no covered class action based upon the statutory or common law of any State . . . may be maintained in any state or federal court . . . ," supply a basis for removal to federal district court, as provided in 28 U.S.C.

§ 1441, of an action whose only filing – a complaint – merely alleges untrue statements against a class of persons in connection with the purchase of a security?

LIST OF PARTIES

Petitioner Charles H. Behlen is the Plaintiff suing on behalf of himself and on behalf of a class of persons similarly situated in an action originally filed in the Circuit Court of Mobile County, Alabama, and removed by the Defendants to the United States District Court for the Southern District of Alabama. He was the Appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondent Merrill Lynch & Co., Inc. is a Defendant in the action filed by Behlen and was an Appellee in the United States Court of Appeals for the Eleventh Circuit.

Respondent Phoenix Investment Partners, Ltd. is a Defendant in the action filed by Behlen and was an Appellee in the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

Charles H. Behlen respectfully petitions this Court to issue a writ of certiorari to review the November 8, 2002, judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears in the Appendix to the Petition at Appendix A, page A1. It is published in the Federal Reporter (third series) at page 1087 of volume 311, and is cited as *Behlen v. Merrill Lynch & Co.*, 311 F.3d 1087 (11th Cir. 2002). The Eleventh Circuit denied an application for rehearing on January 13, 2003, and a copy of that order appears at Appendix B, page A18. The decision of the United States District Court for the Southern District of Alabama is unpublished and is reproduced in Appendix C, page A20.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision affirming the trial court's judgment on November 8, 2002. (App. A.) Petitioner Behlen filed an application for rehearing en banc, and that application was denied on January 13, 2003. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case concerns the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA"). SLUSA is set out in full in Appendix D.

The complete text of 15 U.S.C. § 77p is set forth in Appendix E. Subdivisions (b) and (c) of 15 U.S.C. § 77p provide as follows:

> (b) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (c) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of

> this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

15 U.S.C. § 77p(b) & (c).

Subdivision (a) of 15 U.S.C. § 77v provides as follows:

> (a) Federal and State courts; venue; service of process; review; removal; costs
>
> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject

> to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

15 U.S.C. § 77v(a).

The complete text of 28 U.S.C. § 1441 is set forth in Appendix F.

STATEMENT OF THE CASE

A. Factual Background and Proceedings in the District Court.

From November 1999 to March 2000, Charles Behlen purchased shares in a mutual fund known as the Phoenix-Engemann Aggressive Growth Fund. Behlen purchased the shares from Merrill Lynch & Co. and Phoenix Investment Partners, Ltd. (the "Defendants"). The shares are divided into classes or categories in light of when the sales charge is paid and which, if any, service charges are applicable. Other than service charges and fees, there is no difference between "Class A" and "Class B" shares, which are merely categories for the designation of charges and fees. The underlying securities owned by persons holding "shares" or

interests in the fund, whether "Class A" or "Class B," are the same.

"Class A" shares incur a sales charge when they are purchased, and the sales charge is reduced according to the amount invested at specified intervals and eliminated completely on an individual or aggregated investment of $1,000,000 or more. The sales charges one "may pay" on "Class A" shares are 4.75% for transactions under $50,000; 4.5% for transactions under $100,000; 3.5% for transactions under $250,000; 3% for transactions under $500,000; 2% for transactions under $1,000,000; and no charge for transactions of $1,000,000 or more. "Class B" shares do not incur a sales charge when purchased, but they are subject to a sales charge if redeemed within five years of purchase. There is no reduction in sales charges for "Class B" like there is for "Class A." Also, "Class B" shares are subject to an ongoing distribution and services fee at an aggregate annual rate of up to 1% of the fund's aggregate average daily net assets attributable to the "Class B" shares. "Class A" shares are subject to only a 0.25% distribution and services fee. The net effect of the way these charges and fees are imposed is that persons owning shares purchased for more than $100,000 in the fund are adversely affected economically by "Class B" status in comparison to "Class A" status.[1]

On March 15, 2001, Behlen filed a civil action in state court seeking to recover money damages resulting from his purchase of those shares. In his original complaint, which was styled as a class action, Behlen asserted various state-law claims, including claims for breach of contract, breach

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[1] Informative discussions of multiple classes of shares in mutual funds and the conflicts of interest that arise can be found in a July 2001 *Wall Street Journal* article, which is reproduced at Appendix G, and a March 2003 *New York Times* article, which is reproduced at Appendix H.

of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness. He alleged that the Defendants sold him and the class members Class B shares in the growth fund when they were unknowingly eligible to purchase Class A shares. He further alleged that the Defendants sold them the wrong shares, because the Class B shares were subject to higher fees and commissions than the Class A shares. Specifically, Behlen alleged, among other things, that:

- "Plaintiff and the Class were eligible for reduced charges, fees, and/or commissions available on Class A shares,"

- "Class A shares allow for reduced fees, charges, expenses and/or commissions by Defendant,"

- "Defendants wrongfully failed to set-up, maintain and/or apply appropriate and necessary compliance procedures, administration, and/or supervision to prevent the overcharging of fees and charges to Plaintiff and the Class," and

- "Defendants failed to properly account to Plaintiff and the Class" and "lacked the proper compliance mechanisms and procedures."

On April 27, 2001, the Defendants removed the lawsuit from state court to the United States District Court for the Southern District of Alabama, asserting that the district court had subject-matter jurisdiction over the case pursuant to SLUSA. Three days later, the Defendants filed a motion to dismiss Behlen's complaint. Behlen subsequently filed an amended complaint, in which he asserted the same state-

law claims, deleted the claims for misrepresentation and suppression, and added claims for money had and received and for an accounting. Behlen also removed all explicit references to any fraudulent activity by the Defendants. He argued that SLUSA was no longer applicable to his claims and filed a motion to remand the case to state court.

The district court ultimately entered an order denying Behlen's motion to remand and dismissing all class-wide claims with prejudice – even non-fraud and suppression claims. (App. C.) The dismissal also provided for dismissal of Behlen's individual claims, but without prejudice. Behlen appealed.

B. The Eleventh Circuit's Opinion.

The Eleventh Circuit released its opinion on November 8, 2002. *Behlen v. Merrill Lynch & Co.*, 311 F.3d 1087 (11th Cir. 2002) (App. A). It determined that Behlen's action was completely preempted by SLUSA in all respects, even for non-SLUSA claims. The Eleventh Circuit found that the action was removable because no covered class action can be brought, as opposed to maintained, in state court, apparently construing the doctrine of complete preemption to apply to all claims, even equitable ones, despite the absence of any reference to federal law on the face of the complaint. *Behlen*, 311 F.3d at 1090-93. The Eleventh Circuit did not construe the specific provision of SLUSA which identifies the conditions for removal set forth in 15 U.S.C. § 77p(c); there is no mention of this provision in the opinion. Instead, the Eleventh Circuit referenced the separate provision in 15 U.S.C. § 77p(b), which prohibits any covered class action from being maintained, not brought, in state *or* federal court. The Eleventh Circuit also

reported that Behlen argued that his Complaint was not a "covered class action." *Behlen*, 311 F.3d at 1092.

Finally, deeming jurisdiction to be present under 28 U.S.C. § 1367, the Eleventh Circuit determined that none of Behlen's state-law claims, even equitable claims, may proceed as a class action, and provided for dismissal of them with prejudice rather than remand. It determined that they all were based on allegations of the same fraudulent conduct in connection with purchase of Class B shares, although not alleged in or on the face of the Amended Complaint. Consequently, the Eleventh Circuit effectively held that losses through excess service charges after the purchase could not be a basis for remand of claims not expressly alleging fraud. *Behlen*, 311 F.3d at 1095-96.

REASONS FOR GRANTING THE WRIT

I. Dismissal of the Claims That Do Not Require Consideration of Misrepresentations in Connection with the Purchase or Sale of a Security Is Unjustified and Is in Conflict with a Recent Ninth Circuit Decision.

The Eleventh Circuit's disposition of the case is in conflict with the recent decision of *Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002), issued about ten days before the Eleventh Circuit's opinion was released. In *Falkowski*, after finding that SLUSA provided for dismissal of fraud claims by former employees in connection with their stock options, the Ninth Circuit concluded it to be improper for the district court to have dismissed the breach-of-contract claims arising out of the same conduct. *Falkowski*, 309 F.3d at 1127 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)); *see also, Green v. Ameritrade*, 279 F.3d 590 (8th Cir.

2002) (approving the district court's refusal to dismiss supplemental state-law claims of class-wide wrongdoing after dismissal of SLUSA-barred claims).

The Eleventh Circuit's determination that all the claims of class-wide wrongdoing are due to be dismissed is based on a refusal to give full scope to the potential wrongdoing implied by the pleadings. *See Behlen v. Merrill Lynch & Co.*, 311 F.3d 1087, 1095 & n.6 (11th Cir. 2002). Thus, instead of allowing the class allegations of negligence, in the holding of the securities, to be maintained, without regard for any misrepresentation or deceit in the imposition of service charges on Behlen's account, the Eleventh Circuit ruled more broadly. It wrote that Behlen "could not recover on any state law claim alleging that he and the class were wrongfully induced to buy the Class B shares." *Id.* at 1095 n.6. The same applies to equitable claims. The fact that these claims also could be supported by a previous misrepresentation in connection with the actual purchase made by Behlen should be insufficient to justify *dismissal* of those claims, under SLUSA, even as interpreted by the Eleventh Circuit's opinion. Behlen should have been allowed to seek to maintain these claims of class-wide wrongdoing.

The conflict between the Ninth Circuit and Eleventh Circuit decisions is all the more apparent when one considers the authority of the district court over the state-law claims not prohibited from being maintained by SLUSA. Federal-court jurisdiction over such supplemental state-law claims only exists if they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III . . . ." *See* 28 U.S.C. § 1367(a). In other words, the Ninth Circuit in the *Falkowski* case could only have jurisdiction over the non-SLUSA claims if they bore some significant factual relation to the claims that could *not* be maintained under SLUSA.

Yet, it is this factual relation which the Eleventh Circuit finds to supply the basis for dismissal of *all* claims of class-wide wrongdoing, regardless of whether the claims are based on an untrue statement in connection with the purchase or sale of a security.

In this respect, the Eleventh Circuit's decision also conflicts with this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 & n. 16 (1974) (dismissing "the class action as originally defined . . . without prejudice to any efforts petitioner may make to redefine his class"). The order of dismissal should have provided that it was without prejudice to any efforts that Behlen might make to redefine his allegations of class-wide wrongdoing.

II. The Eleventh Circuit's Holding That SLUSA Authorizes Removal in Accordance with the Doctrine of Complete Preemption Is Erroneous and Conflicts with a Recent Decision of This Court.

The Eleventh Circuit also lacked a basis for removal jurisdiction under 28 U.S.C. § 1441. The directive in SLUSA at 15 U.S.C. § 77p(b) that "[n]o covered class action based on the statutory or common law of any state . . . may be maintained in state or federal court" itself provides no basis for finding that the action may be removed as provided in § 1441. That language says nothing about removal, as available under § 1441,[2] especially given that SLUSA also provides for concurrent federal and state court jurisdiction over all individual claims and over claims of class-wide

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[2] *See, e.g., Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 370-71 (2002) (holding that the All Writs Act, alone or in combination with 28 U.S.C. § 1441, does not furnish removal jurisdiction).

wrongdoing not of the substantive kind listed. *See* 15 U.S.C. § 77v. There is even an affirmative bar against removal of these other types of claims, except as provided in 15 U.S.C. § 77p(c). Oddly though, the Eleventh Circuit made utterly no mention of 15 U.S.C. § 77p(c).

Given this basic structure to SLUSA and the other securities laws, removal was not available under 28 U.S.C. § 1441, unless removal jurisdiction is implicit in the phrase "be maintained" within the bar found in § 77p(b). The significance of the phrase has some importance to the case of *Breuer v. Jim's Concrete of Brevard*, No. 02-337, currently pending before this Court on certiorari review. *See Breuer v. Jim's Concrete of Brevard*, 123 S. Ct. 816 (2003) (granting petition for writ of certiorari). The *Breuer* case presents a question about the effect of the phrase "be maintained" on the removal jurisdiction of a district court, as set forth in Section 216(b) of the Fair Labor Standards Act ("FLSA"). The *Breuer* case was decided by the same panel of the Eleventh Circuit that decided this case. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

If this Court concludes in the *Breuer* case that the FLSA's authorization for an action to "be maintained" in state court does not intimate that it is concerned with the issue of removal and affirms the Eleventh Circuit, then the ruling in *Breuer* will conflict with the Eleventh Circuit's ruling in the present case.

In this case, the Eleventh Circuit found that SLUSA's bar against certain covered class actions being "maintained" showed that a question of federal law was presented by a complaint which was otherwise wholly based on state law. Though the Eleventh Circuit did not say so precisely, its invocation of the "complete pre-emption" doctrine to justify the district court's removal jurisdiction was based on a construction of the federal removal statute, 28 U.S.C. § 1441. *See Behlen*, 311 F.3d at 1090 (citing *Caterpillar Inc. v. Williams*,

482 U.S. 386, 393 (1987)). On the other hand, the Eleventh Circuit's decision in the *Breuer* case found that the use of the same phrase in the FLSA evidenced nothing about whether removal was available under 28 U.S.C. § 1441. Therefore, the *Breuer* case found that the right of action conferred by Section 216(b) of the FLSA was a federal question not otherwise barred from removal.

Petitioner believes that SLUSA's use of the phrase "be maintained" is a reference to the process of determining whether a complaint which alleges class-wide wrongdoing may proceed in a way that binds absent third persons, i.e., as a class action. *See* Rule 23, Fed. R. Civ. P.; *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) ("[T]he allegation . . . neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified."). On its face, the phrase is not synonymous with a directive that no action be commenced. Given the subject matter – allegations of class-wide wrongdoing based on state law which are subject to rigorous analysis before being "maintained" as a class action – it seems highly implausible that Congress meant to allow removal for the mere filing of a complaint.

Had the Eleventh Circuit not found that the "complete pre-emption" doctrine controlled here, it would have reversed the district court's finding of removal jurisdiction over the complaint. The Eleventh Circuit obviously was guided by its own precedent in *Riley v. Merrill Lynch*, 292 F.3d 1334, 1341 (11th Cir.), *cert. denied*, 123 S. Ct. 395 (2002), which was decided after the present case was argued and in which it was announced, with no discussion of 15 U.S.C. § 77v, that "Congress passed the SLUSA . . . and made federal court, with limited exceptions, the sole *venue* for class actions alleging fraud in the purchase and sale of covered securities." *See Behlen*, 311 F.3d at 1091-92, 1093 (citing *Riley*, 292 F.3d at 1341) (emphasis added).

The Eleventh Circuit's approach to federal-court jurisdiction and preemption is more expansive than this Court's precedents allow,[3] even when an exclusive venue is intended. The language of SLUSA is insufficient to identify federal court as an exclusive venue for actions based on state law.

In a case decided after oral argument in the Eleventh Circuit, this Court ruled that a perceived congressional purpose to promote uniformity in a field of law, as opposed to a text that requires it, does not justify a finding of "complete pre-emption." In *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889 (2002), this Court refused to find that the U.S. Court of Appeals for the Federal Circuit was the exclusive venue for appeals from cases related to patents, unless it was apparent on the face of the complaint. Drawing on the principles from the cases construing the general federal-question statute, 28 U.S.C. § 1331, this Court reaffirmed the well-pleaded-complaint rule at length and refused to find that a

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[3] *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380-86 (1996) (holding that 28 U.S.C. § 1738 was not repealed impliedly by 15 U.S.C. § 78aa to bar a state-court decreed class settlement of federal securities claims); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478-79 (1977) (holding that a claim of breach of fiduciary duty that does not include an allegation of misrepresentation or nondisclosure of a material fact is not a claim under the Securities Exchange Act of 1934); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (holding that there was no federal jurisdiction under either of the 1933 or 1934 securities acts over claims based on allegations of mere negligence in the failure to conduct proper audits, and stating that "[w]hen a statute speaks so specifically in terms of manipulation and deception . . . and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct").

counterclaim related to patents sufficed to confer federal jurisdiction. *See Holmes Group*, 122 S. Ct. at 1893-95. Thus, to the extent that the Eleventh Circuit's opinion relies on a perceived congressional goal to promote uniformity in the administration of the securities laws, rather than the text of SLUSA itself, it conflicts with the *Holmes Group* decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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